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In the

Supreme Court of the United States

OCTOBER TERM, 1965

THORNTON G. DEWEY,

Petitioner,

v.

THE AMERICAN NATIONAL BANK, et al.,

Respondents.

On Petition for a Writ of Certiorari to the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas at Amarillo, Texas

BRIEF IN OPPOSITION FOR RESPONDENT, THE AMERICAN NATIONAL BANK OF AMARILLO, TEXAS

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	3
Statement of the Case	3
Conclusion	6

Page

Dewey, Thornton G. v. The American National Bank of Amarillo, Texas, 382 S.W. 2d 524 ..... 1, 3

Texas Revised Civil Statutes, Articles 5069, 5071 and 5073 2

12 U.S.C. 85, 86 ..... 2, 4, 6

28 U.S.C. 1257 (3) 2

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OPINION BELOW

The opinion of the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas is reported in Volume 382, S.W. 2d, page 524, and is set out in full at pages A-1 to A-9 of the Appendix to the Petition.

JURISDICTION

Petitioner undertakes (Pet. p. 2) to invoke the jurisdiction of this Court under 28 U.S.C. 1257 (3) [rights set up and claimed under statutes of the United States]. The Federal statutes under which he seeks to support such jurisdiction are 12 U.S.C. 85 and 86. Both sections relate to national banks.

Section 85 (Pet. A-25) authorizes such banks to charge interest at the rate allowed by the laws of the state where the bank is located [10 per cent in Texas]. Section 86 (Pet. A-26) provides that where a greater interest rate has been knowingly charged than allowed, there shall be a forfeiture of all interest which has been agreed to be paid, and that:

> "In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representative, may recover back, in an action in the nature of an action of debt, twice the amount of interest thus paid from the association taking or receiving the same."

Petitioner also cites the Texas statutes relating to usury (Articles 5069, 5071 and 5073), but, obviously, they are relevant to this proceeding only to the extent that Article 5071 (Pet. A-24) fixes the maximum allowed interest in the state.

Clearly, this Court has no jurisdiction over a usury controversy between private individuals, whose rights are determinable only under the state usury statute. It is equally clear that this Court is without jurisdiction of the controversy between the Petitioner and the Respondent bank because it is not shown from the petition that Respondent

bank "took or received" any part of the interest paid by Petitioner. This will be discussed in more detail under a later subdivision hereof.

QUESTIONS PRESENTED

Petitioner propounds five questions as being presented in this case (Pet. 2-3). All such questions are abstract, specious and insubstantial under the facts. They assume, as true, certain factual contentions and innuendoes urged by Petitioner, which were rejected by the jury, the trial judge, the Court of Civil Appeals, and the Supreme Court of Texas. This is made clear in Respondent's "Statement of the Case" which is as follows:

STATEMENT OF THE CASE

The facts are fully and accurately analyzed in the opinion of the Court of Civil Appeals of the Seventh Supreme Judicial District of Texas, reported at 382 S.W. 2d 524, and copied at page A-1, et seq., of Appendix A to the Petition for Certiorari. For that reason, only a brief summary is presented here.

As the principal and interest was paid on the $100,000.00 note referred to in the opinion of the Court of Civil Appeals,[1], credits were made on the note and the proceeds thereof went to Owen (the lender of the money). No part of the principal or interest so paid was "taken or received" by Respondent bank within the meaning of 12 U.S.C.A. 86. After the lender

[1] These payments represented payments made by the signers of the real estate collateral note which was assigned to Derrell Henry, Trustee, as security for such $100,000.00 note.

(Owen) had received the full amount of principal and interest due on the note made to the trustee, Petitioner herein instituted suit against Respondent on the theory that the $100,000.00 loan was made by the bank, through its vice president, Derrell Henry, and that the bank was liable for twice the amount of interest paid under Article 5072 of the Texas statutes, and under Title 12, Section 86, of the United States Code.

Later, an amended pleading was filed by such Petitioner against the bank, Mr. Henry and Mr. Owen (the lender), in which it was asserted that plaintiff was entitled to recover twice the amount of interest paid, such claim being asserted under Articles 5069 and 5071 of the Texas statute, and under Title 12, Section 86, of the United States Code.

At the close of plaintiff's case on direct, the trial judge sustained the bank's motion for an instructed verdict and proceeded with the trial as between plaintiff (the borrower), defendant Owen (the lender), and defendant Henry (the trustee). Following a jury verdict to the effect that in arranging the loan by Owen to Dewey, Mr. Henry, the trustee, was acting for the borrower (Dewey), and not for the lender (Owen), the trial court also entered a judgment in favor of the said Owen and the said Derrell Henry, trustee.

Thus, plaintiff *asserted* a cause of action against Respondent bank under Title 12, Section 86, U.S.C.A. This Respondent does not deny that he made that claim in his amended petition, in the briefs filed in the Court of Civil Appeals, and his application to the Supreme Court of Texas

for writ of error. Petitioner's difficulty here lies in the fact that he did not *establish by evidence* the theory he asserted in his pleadings.

The Court of Civil Appeals stated (Pet. A-5):

> "There is not anything in the record beyond innuendoes showing that appellee bank had anything whatever to do with the $100,000 loan, except it loaned Mr. Owen, a customer, $60,000 which *he* used in making the Dewey loan. That transaction, as shown by this record, was perfectly legitimate and the testimony is *uncontradicted* that the bank did not receive any interest whatsoever from the Dewey loan."[2]

Petitioner himself says, at page 4 of the Petition:

> "Other than the fact that Henry had full authority to lend more than $100,000.00 to anyone he wanted to without asking anybody, the Bank *had no connection* with the loan except to receive 5% interest on the $60,000.00 of its money which Henry had lent to Owen's account in order to make the loan."

The Court of Civil Appeals referred to the fact that Petitioner had tendered a trial amendment in the trial court, alleging partnership, conspiracy and joint adventure between the three defendants, but stated that there was no probative evidence in the record to support such pleading, and, therefore, it was properly refused. As to the bank's status, the Court of Civil Appeals said:

> "Therefore, the trial court correctly instructed a verdict for the bank."

The subsequent portion of the opinion of the Court of Civil Appeals dealt with the controversy between Petitioner on

[2] All emphasis by italics herein is supplied.

one side and the lender and trustee on the other. Obviously, that controversy and the merits of the claim that the loan was usurious under the Texas statutes were finally determined by the state courts.

CONCLUSION

Clearly, Petitioner has failed to show the existence, under 12 U.S.C. Sec. 86, or otherwise, of a cause of action against the bank for usury. Petitioner was not a customer of the bank; the bank made no loan to him; the bank did not take or receive from Petitioner or anyone else any money as principal, interest, brokerage or otherwise on such loan. The fact that the lender (Owen) borrowed from the bank for a short period of time a portion of the money he loaned Owen would not have imposed any liability on the bank under Section 86 even if the loan by Owen to Dewey had been usurious, which it clearly was not.

Nor does 18 U.S.C. Sec. 220 have any bearing here. That statute only imposes a penalty on an officer of a bank (or other organization of the class referred to) who receives or agrees to receive a fee or commission for procuring a loan *from such bank*, or other such corporation of the class referred to. The loan to Dewey was from Owen, a private individual, and not from the bank of which Henry was an officer.

The petition for certiorari should be denied.

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PROOF OF SERVICE

I, L. A. WHITE, attorney for The American National Bank of Amarillo, Texas, one of the respondents in the above cause, and a member of the Bar of the United States Supreme Court, hereby certify that on the 11th day of June, 1965, I caused a copy of the foregoing brief in opposition to granting a writ of certiorari in the foregoing proceeding to be delivered at the offices of the attorney of record for Petitioner and the attorneys of record for other respondents, as follows:

To: Harris E. Lofthus, Esquire, at his office at 1010 Fisk Building, Amarillo, Texas; and

To: Harlow Sprouse, Esquire, Clayton Heare, Esquire, and H. A. Berry, Esquire, at their office in the Vaughn Building, Amarillo, Texas.

L. A. White

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